STATE OF MINNESOTA
IN COURT OF APPEALS
A11-437

Christopher H. Page, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed September 20, 2011
Affirmed
Minge, Judge

Stearns County District Court
File No. 73-CV-10-4621

Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Lori Swanson, Attorney General, James E. Haase, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Appellant challenges the district court's order sustaining the revocation of his driver's license. He argues that the testing of "first-void"[1] urine samples for alcohol

[1] A first-void urine sample is obtained without having the individual void his or her bladder, wait, and then void his or her bladder again, with a sample for testing being obtained from the second void.

concentration does not meet the *Frye-Mack* standard for admitting scientific evidence and violates his right to equal protection. Because we conclude that the district court did not abuse its discretion by admitting the urine-test result or err by rejecting appellant's equal-protection argument, we affirm.

FACTS

On January 24, 2010, appellant Christopher Page was arrested by a Stearns County deputy on suspicion of driving while impaired. The deputy read Page the implied-consent advisory and offered Page the choice of undergoing a urine or blood test to measure Page's alcohol concentration. Page provided one urine sample within two hours after driving. He did not void his bladder prior to providing that sample. The sample was packaged, preserved, and sent to the Bureau of Criminal Apprehension (BCA) for analysis. The BCA performed gas headspace chromatography on this sample and determined that it contained 0.11 grams of alcohol per 67 milliliters of urine. As a consequence, respondent Commissioner of Public Safety revoked Page's driver's license.

Page petitioned the district court to rescind the revocation of his driver's license. He requested what is known as a *Frye-Mack* hearing to challenge the validity of testing first-void urine samples for alcohol concentration. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980). At the *Frye-Mack* hearing, forensic consultant Thomas Burr testified for Page and BCA forensic scientist Brent Nelson testified for the commissioner. Burr testified that the result of the urine test performed in this case did not accurately reflect Page's alcohol concentration or impairment level because Page was not required to void his bladder before the sample

was collected. He further testified that the testing of first-void urine samples for alcohol concentration "is not a procedure that is generally accepted in the forensic science community." Nelson testified that Page's test results accurately reflected the urine-alcohol concentration within Page's first-void urine sample.

The district court determined that the testing technology and the use of the first-void sample met the *Frye-Mack* standard and that Page's test results were admissible. In addition, the district court rejected Page's equal-protection argument. Accordingly, on January 5, 2011, the district court issued an order sustaining the revocation of Page's driver's license. This appeal follows.

D E C I S I O N

I. TEST RESULTS

The first issue is whether the test results indicating that Page had a urine-alcohol concentration of 0.11 were admissible. The *Frye-Mack* standard governs the admissibility of scientific evidence in Minnesota and requires that (1) the test be based on scientific evidence generally accepted by experts in the relevant field; and (2) the laboratory conducting the tests in the specific case complied with those generally accepted standards and with controls to ensure a reliable test result. *State v. Roman Nose*, 649 N.W.2d 815, 818–19 (Minn. 2002) (citing *Frye*, 293 F. at 1014, and *Mack*, 292 N.W.2d at 768). The proponent of the evidence has the burden of establishing both steps. *McDonough v. Allina Health Sys.*, 685 N.W.2d 688, 694 (Minn. App. 2004).

A full *Frye-Mack* analysis is only required when the scientific evidence is novel or emerging. *Roman Nose*, 649 N.W.2d at 819. Scientific evidence is considered novel

when it has not yet been subject to "the rigors of a *Frye-Mack* hearing," despite years of generalized acceptance by courts. *State v. Edstrom*, 792 N.W.2d 105, 110 n.1 (Minn. App. 2010). When scientific evidence is no longer considered novel, a *Frye-Mack* hearing may still be conducted, but "the focus of the inquiry shifts from the technique's general acceptability to the reliability of the results in the case at hand." *Id.* at 109. This court reviews de novo the question of whether evidence is based on a novel or emerging scientific technique. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000).

In *Edstrom*, this court applied the *Frye-Mack* standard to the use of gas headspace chromatography to analyze first-void urine samples for alcohol concentration. 792 N.W.2d at 110–11. This court held that "gas headspace chromatography is generally accepted in the scientific community for the purposes of measuring the concentration of alcohol in a urine sample" and noted that "there is no evidence to suggest that gas headspace chromatography is any less accepted by the scientific community when it is used on a first-void, as opposed to a later-void, urine sample." *Id.* at 112. The district court had admitted transcripts of testimony from forensic consultant Thomas Burr (the same person who testified here for Page) regarding the lack of reliability of testing on such samples. *Id.* at 108. This court reasoned that "Burr's criticisms of first-void urine testing do not call into question the admissibility of first-void urine test results. At best, his criticisms address the weight to be given to such results." *Id.* at 113. Accordingly, this court held that "the use of gas headspace chromatography to determine the alcohol concentration of a [first-void] urine sample meets the *Frye-Mack* standard for admissibility." *Id.* at 114. Because this court has already addressed whether the use of

gas headspace chromatography on first-void urine samples meets the *Frye-Mack* standard, we conclude that such scientific evidence is not novel or emerging and does not require a full *Frye-Mack* analysis.

Instead, we focus on whether the procedure followed by the BCA in analyzing Page's urine sample departed from the procedure necessary to ensure the reliability of such test results. Here, Page admits that the BCA used a sterilized container, packaged the urine according to the proper procedure, and skillfully performed the gas-headspace-chromatography analysis. Therefore, under *Edstrom*, the test results here meet the *Frye-Mack* standard for admissibility.

Page argues that *Edstrom* focused too narrowly on the use of gas headspace chromatography and that the state did not establish the acceptance and reliability of testing first-void urine samples for alcohol concentration. He argues that experts agree that alcohol concentration derived from a first-void urine sample is not a reliable indicator of a person's actual alcohol-caused impairment at the time of driving. In *Edstrom*, this court considered and rejected that argument. 792 N.W.2d at 113.

Further, the statute governing license revocation in this case, Minn. Stat. § 169A.52, subd. 4(a) (2010), provides a mechanical testing yardstick. The statute mandates that the commissioner revoke a person's driver's license if a police officer has probable cause to believe that person has been driving while impaired and if a chemical test of the driver's breath, urine, or blood collected two hours after driving has an alcohol concentration of 0.08 or more. Minn. Stat. § 169A.52, subd. 4; *see also* Minn. Stat. § 169A.03, subd. 2(3) (2010) (defining alcohol concentration as including "the number of

grams of alcohol per 67 milliliters of urine"). Here, the analysis determined Page had an alcohol concentration of 0.11 grams of alcohol per 67 milliliters of urine. There is no requirement that the BCA isolate the urine being produced by the driver during the time the individual was actually driving and analyze only that urine for alcohol concentration. *See Edstrom*, 792 N.W.2d at 113–14 (refusing to create a requirement that the state determine the alcohol concentration of the urine the individual is secreting at the time of driving or within two hours of driving because the statute does not contain such a requirement).

Because our decision in *Edstrom* established the acceptance and reliability of using gas headspace chromatography on first-void urine samples to determine alcohol concentration, and because the provision of the statute in question does not require the commissioner to determine an individual's alcohol concentration at the time of driving or actual impairment, the district court did not err in concluding that the test results indicating Page's urine-alcohol concentration were admissible.

II. EQUAL PROTECTION

The second issue is whether the implied-consent law and the revocation of Page's driver's license after use of a first-void urine test violates Page's right to equal protection. The implied-consent law states that "[t]he peace officer requesting a test pursuant to this section may direct whether the test is of blood, breath, or urine." Minn. Stat. § 169A.51, subd. 3 (2010). The right to equal protection in the Minnesota Constitution is contained within a provision that reads: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the

land or the judgment of his peers." Minn. Const. art. I, § 2; *see also* U.S. Const. amend. XIV, § 1. It has been interpreted to require that "all persons similarly circumstanced shall be treated alike." *In re Estate of Turner*, 391 N.W.2d 767, 769 (Minn. 1986). Whether a statute is constitutional is a question of law subject to de novo review. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). "Minnesota statutes are presumed constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989).

A statute may violate the equal-protection clause either by its express terms—a "facial" challenge—or by its application—an "as-applied" challenge. *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). A facial challenge "asserts that at least two classes are created by the statute, that the classes are treated differently under the statute, and that the difference in treatment cannot be justified." *In re McCannel*, 301 N.W.2d 910, 916 (Minn. 1980). An as-applied challenge asserts that a facially neutral statute "is applied in a way that makes distinctions between similarly situated people without a legitimate government interest." *Richmond*, 730 N.W.2d at 71.

First, Page argues that the law is facially unconstitutional because drivers who are identified as likely impaired are divided into three categories for blood, urine, and breath testing, and that drivers subjected to first-void urine testing may exceed the allowed alcohol concentration and lose their license, even if they are not actually impaired and would not lose their license with a blood or breath test. Because those subjected to a

urine test are not members of a suspect class and because the law does not involve a fundamental right, we apply the rational-basis test to Page's equal-protection challenge. *See State v. Benniefield*, 678 N.W.2d 42, 46 (Minn. 2004) (applying rational-basis test when no suspect classification or fundamental right is involved). Under the rational-basis test, a statute is constitutional "if the classification drawn by it is rationally related to a legitimate governmental interest." *Id.* (quotation omitted). To satisfy the rational-basis standard, (1) any distinctions in a statute between classifications "must not be manifestly arbitrary or fanciful but must be genuine and substantial"; (2) the classification "must be genuine or relevant to the purpose of the law"; and (3) "the purpose of the statute must be one that the state can legitimately attempt to achieve." *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991).

Here, there are genuine and substantial reasons for authorizing three separate testing methods. By providing three tests, the legislature has allowed for flexibility in testing that is necessary to properly enforce the law. If a driver is unable or unwilling to submit to a particular form of testing, the officer can offer alternatives; likewise, if there is no qualified personnel available to administer a particular test, the officer still has an option available. *See Franko v. Comm'r of Pub. Safety*, 432 N.W.2d 469, 472 (Minn. App. 1988) (stating that the legislature imposed flexibility because "a person may have a reasonable aversion to giving a blood or urine sample"). In ensuring that at least one form of testing is always available, the legislature furthered the implied-consent law's purpose of promoting public safety. *See Rude v. Comm'r of Pub. Safety*, 347 N.W.2d 77, 80 (Minn. App. 1984) (acknowledging that purpose of implied-consent law is to

"promote public safety on the highway and aid the proper enforcement of our D.W.I. statute"). And it is undisputed that the public safety is a legitimate concern of state government. *See C & R Stacy, LLC v. Cnty. of Chisago*, 742 N.W.2d 447, 454 (Minn. App. 2007). Therefore, because all three prongs of the rational-basis test are satisfied, the implied-consent law does not violate Page's right to equal protection.

Second, Page argues that the implied-consent law is unconstitutional as applied to him. He argues that the implied-consent law allows the police to arbitrarily determine which form of testing to administer to a particular driver. *See* Minn. Stat. § 169A.51, subd. 3 (providing that an officer may direct whether test offered is of blood, breath, or urine). But, Page's submission to a urine test did not arise from the arbitrary application of the statute by police; instead, Page chose to submit to the urine test. In addition, this argument was rejected in *Hayes v. Comm'r of Pub. Safety*, 773 N.W.2d 134, 140 (Minn. App. 2009) (concluding that "it is not enough to prove that differential applications of [the implied-consent] statute are arbitrary" to establish an equal-protection violation). Accordingly, we conclude that Page has not established that the administration of a urine test violated his constitutional right to equal protection.

Finally, we note that the first-void urine-sample-test controversy is evolving. But, the technology and sample-testing method have been upheld in Minnesota. We recognize that the vagaries of when a person ingested alcoholic beverages, the time period over which urine pools in the bladder, when the bladder is emptied and refills, and other factors may affect the correlation between test results and actual impairment during driving. The law designates a timeframe for collecting a sample and alcohol levels.

Although the law as written does not account for such vagaries in physiology and testing, the record indicates that the threshold alcohol level for the implied-consent law is conservative and has a built-in margin of error that favors the driver. The use of this standard and the discretion afforded law enforcement in administering the test with first-void samples is a legislative determination.

Affirmed.

Dated: